IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 61096-1-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
SEAN MAGUIRE,	)	
	)	
Appellant.	)	FILED: August 3, 2009

BECKER, J. – Appellant Sean Maguire, convicted of third degree child molestation, contends the trial court should have reviewed the victim's medical records in camera for evidence that her medical condition made her testimony unreliable. But Maguire did not establish a factual foundation for his argument that the records might contain information material to his defense. And while the trial was marred by an officer's testimony that Maguire said he wanted to talk to his lawyer before giving a recorded statement, in context this reference did not

amount to a comment on the exercise of a constitutional right and Maguire has not established that it was prejudicial.

FACTS

Fifteen years old at the time of trial, SM is the daughter of Maguire and his ex-wife Sharmon Cooper. SM lived with Cooper after her parents' divorce in October 2006. She spent every other weekend with Maguire. According to SM's statements before and during the trial, Maguire touched the girl's breasts and vagina under her clothes on several occasions between August 2006 and February 2007. In January 2007, SM told her aunt, prompting an investigation. Interviewed by a detective about the allegations, Maguire denied them. A jury convicted him of one count of child molestation in the third degree.

IN CAMERA REVIEW

Before trial, SM made inconsistent statements about when the touching occurred and how often. In an interview with Detective Kevin Grossman, SM at first reported that it started in September 2006 but later said it started in January 2007. During a defense interview, SM said that nothing happened between September and December 2006. Maguire knew that SM had been diagnosed with neurofibromatosis and that she had substantial learning disabilities. Although an eighth-grader, she studied at a fourth-grade level and was in the first percentile in math. Maguire wanted to show that SM's mental and neurological deficiencies made her unusually suggestible.

Maguire issued subpoenas for SM's school records, medical records from two hospitals, and records from Child Protective Service (CPS). The State opposed disclosure of confidential records. Maguire responded that he had a due process right to evidence proving that SM was suffering from a mental disability that reasonably called into question her ability to observe, recall or communicate:

> The Defense wanted to review records which would explain [SM's] mental problems, her level of competency, her susceptibility to being led in any interrogation or to have information planted (intentionally or accidentally) to create a memory of an event that had not occurred – a false memory, and any other records that could provide to the defense the names of witnesses that had contact with [SM] from July 2006 until April 5, 2007 (date of case filing).
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> The Defense believed such records to have value in light of the reports from the Wenatchee Sex Ring fiasco where retarded and mentally impaired children were led into reporting crimes that had not occurred. The result of the Wenatchee Sex Ring was a change in laws requiring a modicum of training for investigators. Studies have found young children to be more suggestible than adults and younger children to be more suggestible than older children and retarded children or slow learners to be the more susceptible of all in responding to questions in a way that pleases the questioner but has no relationship to the actual truth.
>
> [SM] was diagnosed as suffering from Neurofibromatosis Type 1 by Children's Hospital Genetic Clinic. Neurofibromatosis is characterized by learning disabilities, behavior disorders and mental retardation. In September 2006 [SM], although in Grade 8, was determined to have a grade equivalent of 2.5 with a percentile rank of 1 in Math and basic skills that were less than a fourth grader. (i.e. at a mental age less than the presumed age of legal competency).
>
> This inquiry into [SM's] mental state was done because the defendant denied all criminal acts and [SM's] recounting of the molestation has varied considerably.
>
> …

> Children tend to draw upon all available information in the interview situation to provide the interviewer what they believe the interviewer wishes to hear. Cole and Loftus (1987) state that "…the demand characteristics of being given certain information by an adult, and even of being questioned by an adult are powerful components of suggestibility in young children." (p.199) and Ceci et al. (1987) indicate that the young children's suggestibility could be partially accounted for by the fact that they are especially likely to conform to what they believe to be the expectations of the adult. To avoid this, King and Yuille (1987) stress that the child be told that the interviewer is only interested in what the child remembers and that admissions of memory failure and memory gaps are expected.

This appeal concerns medical records; the CPS file and the school records are no longer at issue. The State agreed to the release of the medical record pertaining to SM's appointment with her pediatrician, Dr. Ruth Conn, on January 31, 2007, shortly after her disclosure. Maguire moved for in camera review of the withheld medical records. The court denied this request.

At trial, SM continued to have trouble giving a consistent account of the alleged incidents of molestation. At the end of trial, the State dismissed two of the three originally charged counts.

Maguire contends that the trial court erred in failing to review SM's medical records in camera. There is no dispute that SM's medical records contain privileged communications that are protected from disclosure unless the patient consents or the court orders disclosure. See RCW 5.60.060(4). However, a defendant has a due process right to review privileged material under certain circumstances. In order to justify in camera review of a record that

is otherwise deemed privileged or confidential by statute, the defendant must establish a basis for his claim that it contains material evidence. Mere speculation that an item of undisclosed information might be helpful is not enough. There must be a plausible showing that the information will be both material and favorable to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006).

The decision whether to conduct an in camera review of privileged records is subject to review for abuse of discretion. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

In Kalakosky, the defendant was charged with four rapes and an attempted rape. Defense counsel asked the trial court to conduct an in camera inspection of the notes of a rape crisis center counselor who had counseled one of the victims shortly after the rape. The motion for in camera review stated only that the "notes may contain details which may exculpate the accused or

otherwise be helpful to the defense." Kalakosky, 121 Wn.2d at 544. The trial court denied the motion. Our Supreme Court affirmed the trial court's ruling:

> If we concluded that such a statement was sufficient to constitute a threshold showing, then such records would always be susceptible to in camera review. We do not perceive this to have been the intent of the Legislature when it passed the Victims of Sexual Assault Act. We decline to ignore the statute's requirement for "reasons" why a defendant is seeking in camera review of the rape crisis center's records.

Kalakosky, 121 Wn.2d at 548. The court held there was no constitutional impediment to the statutory requirement for a specific showing of need to inspect rape crisis center records. Kalakosky, 121 Wn.2d at 549.

Kalakosky was followed in State v. Diemel, 81 Wn. App. 464, 467, 914 P.2d 779 (1996). Diemel involved a rape charge where a woman alleged that she was forced to have sex with the defendant during a sailing trip. After the boat docked, she called 911 from a telephone booth. Police arrived and found her quite upset and cowering in the telephone booth. Several weeks later, the woman was referred to a therapist who counseled her for seven months. Prior to trial, the defendant filed a written motion, affidavit, and brief requesting that the court conduct an in camera review of the records pertaining to this counseling, and order disclosure of any of the records relevant and helpful to the defense. The three arguments he made in support of the motion were summarized as follows:

> First, because K maintained she was never intoxicated throughout the evening yet had a .08 blood alcohol level several

> hours after the alleged rape, she may have told her therapist something different about her drinking and intoxication than she admitted before. This information was to be used to impeach K's credibility. Second, defense counsel argued that K had confided to others that she was once in an abusive relationship and thus there might be a reason other than a sexual assault to explain the way she acted in the telephone booth. In support of this argument defense counsel stated he contacted a therapist who said that post-traumatic stress disorder resulting from some types of physical abuse, in conjunction with alcohol abuse, could have been the reason K cowered in the phone booth. Nonetheless, there was no affidavit from the unnamed expert. Third, defense counsel argued that K might have told her therapist about consenting to the sexual intercourse or foreplay with Diemel.

Diemel, 81 Wn. App. at 466.

The trial court denied the defendant's motion. Comparing his presentation to the materials submitted in Kalakosky, the Court of Appeals affirmed the trial court's ruling:

> Although the affidavit presented here is "better" than the Kalakosky affidavit, the trial court did not abuse its discretion when it determined that Diemel failed to make the requisite showing that the records of K's therapist would contain information useful to the defense under either a "plausible showing" or a "likely" standard. A review of the affidavit reveals considerable speculation and little factual basis or foundation. Further, the evidence of alcohol consumption was otherwise available. The only evidence to support the post-traumatic stress theory of K's overreaction was a statement by her to Diemel that she once had been involved in an abusive relationship. The fact that she might have discussed the circumstance of her "consent" with the therapist is not sufficient in and of itself to justify the intrusion of inspection. Otherwise, any time consent is at issue, post-event counseling records would be open to inspection. A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection.

Diemel, 81 Wn. App. at 469.

In Gregory, in reviewing a conviction for first degree rape, the Supreme Court held the trial court abused its discretion by refusing the defense request to review then-pending CPS dependency files concerning the victim's children. The defense theory was that the victim, RS, had consented to have sex. There was evidence that RS had formerly engaged in prostitution. The court noted that a request for in camera review had to be based on more than speculation. "However, Gregory made a more concrete connection between his theory of the case and what he expected to find in the dependency files, i.e., it was reasonable to believe that if R.S. was still engaging in prostitution in 1998, evidence of that would be reflected in the dependency files and, if so, the reports contained therein could reveal potential witnesses." Gregory, 158 Wn.2d at 795 n.15. Thus, in camera review of the dependency files "might have led to witnesses that could confirm or refute R.S.'s claim that she did not engage in streetwalking after 1995." Gregory, 158 Wn.2d at 795. Maguire argues that he, like the defendant in Gregory, made a "concrete connection" between his theory of the case and what he expected to find in the protected medical records.

It was undisputed that SM had experienced developmental delays. Maguire asserted there were studies purporting to show that people with developmental delays are necessarily more susceptible to persuasion by others. But such studies are not in the record, and Maguire did not provide any affidavits

from an expert to that effect. See Diemel, 81 Wn. App. at 466. The record contains no particularized showing that a person with SM's diagnosis would likely be unusually prone to fabrication or giving inaccurate testimony. Without such a showing, it was not reasonable to believe SM's medical records would contain material evidence.

At one of the hearings on Maguire's request for in camera review, the State submitted a letter from Dr. Conn stating that SM had a cranial MRI that was within a normal range and that she had not manifested any neurological problems related to her diagnosis of neurofibromatosis. Maguire now argues that he was at least entitled to a review of the medical records to determine whether they contained any information that would impeach Dr. Conn's opinion. We disagree. Dr. Conn's letter was not put before the jury. Maguire had the burden of presenting the trial court with a concrete connection between his theory of the case and what was likely to be in the files. He did not meet his burden. That reality is unaltered by the fact that the State presented Dr. Conn's letter.

Maguire also contends that it was unfair to deny the defense full discovery of the victim's developmental delays while allowing the State to use these same delays as a "sword" to explain why SM was inconsistent in her testimony about the relevant time periods. But the trial court prohibited the State from eliciting or using any information about SM's disabilities to explain her

delayed reporting or inconsistent statements, other than the obvious fact that SM was behind grade levels in school. Maguire has not pointed out any occasion during the trial where the jury heard the State use or refer to the medical records that were the subject of Maguire's request for in camera review.

On this record, the trial court appropriately concluded that the requested medical records were not material to the preparation of Maguire's defense. We find no abuse of discretion.

REFERENCE TO LAWYER

During the investigation into the allegations made by SM, Maguire was interviewed by Detective Grossman. Detective Grossman testified that the interview ended with Maguire saying that he wanted to speak to a lawyer before he would give a recorded statement. Maguire contends this testimony violated his constitutional rights. He contends he was prejudiced by the detective's testimony because it portrayed him as evasive and conscious of guilt.

The testimony came out during this exchange between the prosecutor and the detective during the State's case:

> Q: How long was your discussion with him there in his apartment?
> A: Maybe 20 minutes.
> Q: Who did most of the talking?
> A: Probably split 50/50, something like that.
> Q: So other than this health insurance issue, did he mention any other reason why he felt like this was being made up about him?
> A: No.
> Q: It doesn't sound like he ever mentioned, my daughter has a learning disorder and gets confused or anything like that?
> A: No. He never mentioned that to me.

> Q: And other than her telling him that she liked school when actually she didn't, there was -- he didn't call her a liar or say she had ever lied in the past?
> A. He wouldn't call her a liar, no.
> Q: What do you mean?
> A: I asked him -- I said if she's making these allegations and you're saying they are not true, are you saying she's a liar, and he said, no, I'm not going to call her a liar, but the allegations are a lie.
> Q: You said this conversation lasted about 20 minutes?
> A: About that.
> Q: How did it end?
> A: Well, I asked if I could take a recorded statement from him as I did [with SM], and he said he wanted to talk to a lawyer before doing that.
> [DEFENSE]: I object to that, Your Honor. And if we could approach sidebar.
> [COURT]: Just a moment, please. (Sidebar discussion.)
> [COURT]: Ladies and gentlemen, it's almost 4 o'clock. I'm going to excuse you for the day. Ask you return tomorrow at 9 o'clock.

With the jury excused, Maguire moved for a mistrial on the grounds that the detective deliberately and willfully brought up Maguire's statement about wanting to talk to an attorney, thus impermissibly commenting on his exercise of the right to counsel. He told the court that he actually did try to give the detective a statement after this interview and that he had also been willing to take a polygraph and have a sexual deviancy evaluation. The court denied the mistrial motion and ordered that there be no further reference either to Detective Grossman's remark and no reference to Maguire's willingness to take a polygraph and complete a sexual deviancy evaluation.

Detective Grossman's remark can be properly analyzed as an alleged comment on pre-arrest silence. See, e.g., State v. Burke, 163 Wn.2d 204, 181

P.3d 1 (2008); State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999). When defendants take the stand, their prearrest silence may not be used as substantive evidence of guilt. But "a mere reference to defendant's silence" may be permissible. Burke, 163 Wn.2d at 206. A statement will not be considered a comment on a constitutional right to remain silent if it is so subtle and brief that it does not "naturally and necessarily" emphasize a defendant's pre-arrest silence. Burke, 163 Wn.2d at 216. A remark that does not amount to a comment is considered a mere reference to silence and is not reversible error absent a showing of prejudice. Burke, 163 Wn.2d at 216.

An example of a "mere reference to silence" is found in State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). In Lewis, the charges were rape and assault. The investigating officer testified on direct that he had contacted Lewis by telephone and Lewis admitted that the women had been in his apartment, but denied that anything had happened. The officer said, "my only other conversation was that if he was innocent he should just come in and talk to me about it." Lewis, 130 Wn.2d at 703. The court found that the officer's testimony was not even referring to the defendant's silence:

> . . . the officer in this case made no comment on Lewis's silence. The only statement he made was that Lewis had told him he was innocent.
>
> There was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt. Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would

> probably derive no implication of guilt from a defendant's silence. A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. That did not occur in this case.

(Citations omitted.) Lewis, 130 Wn.2d at 706.

Here, the prosecutor asked Detective Grossman how his interview with Maguire ended. The detective responded that he asked Maguire if he would be willing to give a recorded statement. According to the detective, Maguire answered that "he wanted to talk to a lawyer before doing that." Defense counsel immediately objected, and the court excused the jury.

There does not seem to be any relevance to the challenged question and answer. Such references skate on thin ice and should be avoided. Nevertheless, in this case we conclude the detective's remark did not implicate Maguire's constitutional rights. Unlike in Burke, where the prosecutor repeatedly referenced the improper comment in closing argument, the prosecutor here made no further mention or opinion of Maguire's refusal to give a recorded statement. This case is more like Lewis where the officer said, "my only other conversation was that if he was innocent he should just come in and talk to me about it." Similarly in Sweet, a police officer gave the following testimony: "'I asked him if he would want to take a polygraph examination when he returned to our jurisdiction, ... He indicated that he would be willing to do that when he got back" and "I asked him if he would provide me with a written statement, and he

said that he would do that after he had discussed the matter with his attorney.'" Sweet, 138 Wn.2d at 480. The court held this testimony did not require reversal. Detective Grossman's testimony was along the same lines. It did not "naturally and necessarily" emphasize that Maguire was exercising his right to remain silent. See Burke, 163 Wn.2d at 216.

Maguire in fact did not remain silent. He willingly gave a complete interview. In the context of this week long trial, a single and unemphasized statement that Maguire turned down a request to make a tape-recorded statement until he had a chance to talk to an attorney did not invite the jury to draw an inference of guilt and, as in Lewis, was not prejudicial. The trial court did not err in refusing to grant a mistrial.

PROSECUTORIAL MISCONDUCT

Maguire contends the prosecutor committed misconduct during rebuttal closing argument by mentioning that the defense had the same opportunity to call these witnesses as the State did. Maguire contends the prosecutor knew this was a false statement.

During closing argument at trial, Maguire criticized the State for not presenting the testimony of anyone from CPS and argued that the absence of that testimony should be construed against the State. Along those same lines,

Maguire later invited the jury to think about "who wasn't here. Who wasn't called. Whose testimony wasn't presented as part of this grand corroboration." The remarks the prosecutor made in response to that argument are before us for review:

> [STATE:] … I want to start by addressing one argument about what we don't have, the evidence you don't have. Defense counsel mentioned that repeatedly. Where is CPS, where is this, where is that, where is the other.
>
> A defendant in a criminal case doesn't have the burden to do anything. They can sit there. They don't have to make any objections. They don't have to testify. They don't have to call any witnesses. That's the way our system is set up. It's my burden. They can remain silent and not participate at all. If I don't meet my burden, they still have to be found not guilty by the jury.
>
> That changes, however, when the defendant opts to put on a case and opts to testify. Once they put on a case, once the defendant takes the stand, you're entitled to scrutinize his testimony and the testimony of his witnesses with the same level of intensity that you do mine.
>
> You are also entitled to look at the evidence they present and ask, why did I hear that, why didn't I hear that, once they put on a case. The defense in this case put on a case. They called two witnesses. They called the defendant's fiancé, and they called the defendant.
>
> It's a little disingenuous for a defense attorney to stand up and say, where is this evidence, why didn't we hear from CPS, because, ladies and gentlemen, what Mr. Roe didn't tell you is he's got the same doggone subpoena power that I do.
>
> He knows where CPS is the same as I do. And if there was a single shred of information in that CPS report that was inconsistent with what [SM] had told anybody else, do you think for a moment that he wouldn't have called them? Of course, he would have called them, and you would have had them up on the stand as long as he had [SM], picking every issue, picking every little thing she said that he thought was inconsistent.
>
> So this idea that there is missing witnesses, they are missing because he didn't want them here. Ask yourselves why that is. Because it's not helpful to his client. Because he knows

> what they are going to say, and they are going to agree with [SM].
>
> And that goes to the other stuff that he talked about. He said over and over you don't know her actual disability, and you don't know this and you don't know that. His brother is the principal of [SM's] former school. If she was a forgetful kid, if she was a liar, if she couldn't keep anything straight in the classroom, there is a chair right there for him to talk about that from.
>
> He knows where they are. He knows what they are going to say, and he can bring them into court, and he didn't. Why? Because he knows what they would say. They would say the same things that he said. [SM] forgets her times tables and stories once in a while. She can't keep a story straight even after I read it to her, but she's no liar. You can call her friends. He talks about suggestibility and taint. There is experts that testify about that stuff—
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> [DEFENSE:] Objection, Your Honor. This was covered by pretrial ruling.
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> [STATE:] I will rephrase that, Your Honor.
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> [DEFENSE:] Please do. Sustained.
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> [STATE:] Might there be an expert, if he wanted to talk about taint with Detective Grossman, to talk about suggestive questioning --
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> [DEFENSE:] I will renew it, Your Honor. If we can have a sidebar on this.
>
> [STATE:]: It's a rhetorical question, Your Honor.
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> THE COURT: Overruled. Proceed.
>
> [STATE:] So when there is this thing hanging in the air that there is evidence you didn't hear and information you don't have and somehow there is some nefarious intent, consider that argument in light of the fact that the defense put on a case, same subpoena power we do, and they can develop that information as well as we can.

To establish prosecutorial misconduct, the burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. Gregory, 158 Wn.2d at 858. Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. Defense counsel's failure to object to the misconduct at trial constitutes

waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. Gregory, 158 Wn.2d at 841.

Maguire made no objection to the State's argument related to CPS. Thus, he waived the prosecutorial misconduct claim on appeal because the argument was not incurably prejudicial. And in any event the prosecutor was not making a false statement by arguing that the defense had the same opportunity to call the witness as the State did. Maguire did have the opportunity to obtain CPS records because the court did not quash any subpoenas directed to CPS and the State did not object to the disclosure of its records.

The prosecutor also commented on Maguire's failure to call an expert witness. Maguire did object and his objection was overruled.

The prosecutor's argument focused on the absence of a defense witness who might explain that police investigators can taint the testimony of witnesses by asking leading and suggestive questions:

> [STATE:] . . .He talks about suggestibility and taint. There is experts that testify about that stuff—
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> . . .
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> Might there be an expert, if he wanted to talk about taint with Detective Grossman, to talk about suggestive questioning --
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> . . .
>
> So when there is this thing hanging in the air that there is evidence you didn't hear and information you don't have and somehow there is some nefarious intent, consider that argument in light of the fact that the defense put on a case, same subpoena power we do, and they can develop that information as well as we can.

Maguire had identified Dr. John C. Yuille as a possible witness as to the method of interrogation of SM:

> The accusations by [SM] as she provided to the prosecution witnesses, have a number of internal contradictions as to location, times and actual acts she claims the Defendant performed. The Defense may seek to introduce the expertise of Dr. John C. Yuille as to the method of interrogation of [SM]."

The defense did not call Dr. Yuille to testify at trial. Maguire has not shown that the trial court, by refusing access to SM's medical records, prevented him from presenting expert testimony by Dr. Yuille or anyone else on the subject of suggestive interrogation. By mentioning the absence of a defense expert witness on the subject of "suggestibility and taint," the prosecutor was not taking unfair advantage of the ruling that prevented Maguire from gaining access to SM's medical records.

The State does concede that the prosecutor's remarks concerning Maguire's failure to present expert testimony improperly shifted the burden of proof. Even if the prosecutor commits error, a conviction will not be reversed unless within reasonable probabilities the outcome of the trial could have been materially affected had the error not occurred. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).

The court instructed the jury that the defense "has no burden of proving

that a reasonable doubt exists." The instruction made clear that the jury could find a reasonable doubt even in the absence of defense evidence, and the burden of proof was on the State. The prosecutor reminded the jury of the correct burden of proof before he started discussing the absence of witnesses. Under the circumstances, it is unlikely that the prosecutor's remark affected the outcome of the trial. See State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546 (1990); State v. Hardy, 83 Wn. App. 167, 178, 920 P.2d 626 P.2d 626 (1996), rev'd on other grounds, 133 Wn.2d 701, 946 P.2d 1175 (1997).

JURY SELECTION CHALLENGE

After sentencing, Maguire filed a motion for a new trial based on counsel's discovery that the jury venire had not been drawn from the entire county. The trial judge denied the motion as untimely.

Maguire contends the trial court should have ordered a jury selected from the entire county rather than only from the north assignment area. This argument fails under our Supreme Court's recent decision in State v. Lanciloti, 165 Wn.2d 661, 663, 671-72, 201 P.3d 323 (2009).

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Cox, J.